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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Working Party No. 3 on Co-operation and Enforcement**

### **Criminalisation of cartels and bid rigging conspiracies – Note by Ukraine**

9 June 2020

This document reproduces a written contribution from Ukraine submitted for Item 1 of the 131<sup>st</sup> OECD Working Party 3 meeting on 9 June 2020.  
More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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## *Ukraine*

### **1. Scope of sanctions and exchange of information**

#### **1.1. Historical component**

1. From 1994 to 2001, there was a criminal liability under the Criminal Code of Ukraine for the price-fixing agreement. This provision was reflected in the first edition of the new Criminal Code of Ukraine, which came into force on September 1, 2001. It provided for liability for bid-rigging to "artificially raise or maintain monopoly prices (tariffs), allowances (surcharges), mark-ups to eliminate competition between economic entities contrary to the requirements of antitrust law. However, this rule did not last long - only until April 2003, when to decriminalize certain offences in the sphere of economic competition, which do not pose a significant social danger, the Criminal Code was amended accordingly by reducing criminal liability. The Antimonopoly Committee of Ukraine (hereinafter – AMCU) is not aware of any case of criminal prosecution for the duration of the specified norm.

#### **1.2. Legal background**

2. The AMCU is a state authority with a special status. The peculiarities of the special status of the AMCU are determined, in particular, by the unique procedural principles of the AMCU's activity, protection of personal and property rights of the AMCU's employees at the level with law enforcement officials. The AMCU's decisions are made collectively and are binding.
3. In Ukraine, there is no criminal liability for violation of the legislation on protection of economic competition, and the AMCU is solely responsible for investigating these violations.
4. Cartel and bid-rigging in Ukraine are types of anticompetitive concerted practices of economic entities. Following the legislation on the protection of economic competition, economic entities are legal entities and entrepreneurs, or natural persons who exercise control over another legal or natural person.
5. For cartel and bid-rigging, sanctions are imposed in i amount up to 10% of the entity's annual revenue for the last financial year preceding the year in which the penalty is imposed. The civil liability for damages caused by cartel or bid-rigging in double the amount of damages. Moreover after the AMCU's decision on bid rigging cases the companies are "black-listed" (banned to participate in public procurement for three years).

#### **1.3. Exchange of information with law enforcement agencies**

6. There is a law enforcement system in Ukraine which consists of law enforcement agencies. The provisions on the interaction of the AMCU with some law enforcement agencies, such as the State Bureau of Investigation and the Security Service of Ukraine, are explicitly set out in the laws on these law enforcement agencies. Besides, the procedure for interaction may be determined by the internal acts of the AMCU, for example, the order on the interaction between AMCU's bodies and agencies which combating organized crime.
7. One of the investigative tools of the AMCU is the power to involve the police, customs and other law enforcement agencies officials to ensure that a case of violation of the law on the

protection of economic competition is considered, in particular, during an investigation. However, law enforcement agencies are empowered to use exclusive tools inherent in them only in connection with criminal or administrative offences. Instead, if there are no indications of such actions, they don't have grounds for intervention. For example, the refusal of an employee of an entity to provide access to certain items, documents or other media is not in itself a ground for intervention by the national police or other law enforcement agencies.

8. Mainly interaction with law enforcement agencies occurs through the exchange of information.
9. According to Article 21 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine" state bodies, their officials are obliged to provide the AMCU with information that may indicate a violation of the legislation on protection of economic competition.
10. The Criminal Code of Ukraine provides responsibility for the appropriation, embezzlement of property or the seizure of it by abuse of official position. There are often cases when law enforcement agencies, when investigating such offences, find signs of violation of the legislation on protection of economic competition, namely bid-rigging. In such a case, the information on perceived violations and supporting evidence is forwarded to the AMCU for consideration.
11. The AMCU can open investigation on violation of the legislation on protection of economic competition, in particular, on the submission of state authorities or its initiative. The AMCU initiates part of the bid-rigging cases on its effort but based on information provided by law enforcement agencies.
12. The total number of investigation on violations of the legislation on the protection of economic competition opened on the application/submission of law enforcement agencies in 2019 was 115 cases. Of these, 113 cases (98%) relate to anticompetitive concerted practices of economic entities. The share of decisions that were taken by the AMCU on the application/submission of law enforcement agencies in 2019 was 10%.
13. Thus, the AMCU, having received information from law enforcement agencies, may initiate proceedings, conduct appropriate investigations and, using, including, law enforcement materials, make appropriate decisions in the case.
14. There are cases where the AMCU has already initiated proceedings and is collecting and analyzing evidence in the case. In such a case, the law enforcement authorities, in the presence of relevant information and evidence that may indicate signs of violation of the legislation on protection of economic competition, may transmit the said information to the AMCU, which may later be used as evidence to prove the relevant violation.
15. Interaction is also carried out in the opposite direction. If during the investigation of cases or in the exercise of other powers, the AMCU has identified signs of criminal offences, then information on these signs and supporting evidence is forwarded to the relevant law enforcement agencies. Report to the bodies involved in the fight against organized crime, apart from current information, shall be transmitted periodically, twice a year. The AMCU can also direct decisions or respond to law enforcement requests.
16. Law enforcement agencies to which the AMCU should report circumstances that may indicate criminal offences and with which the AMCU most often interacts or can interact are the Prosecutor General's Office of Ukraine, the Security Service of Ukraine, the National Police, the National Anti-corruption Bureau of Ukraine, the State Bureau of Investigation. In doing so, however, the AMCU notifies these authorities of acts that are recognized by law as criminal offences. Most of these are crimes against property, crimes in the field of economic activity, crimes against the authority of public authorities, local

self-government bodies, crimes in the area of official action and professional activity related to the provision of public services.

17. Thus, very often, the evidence gathered in criminal investigations is used to investigate violations of competition law and vice versa. Such interaction between the AMCU and the law enforcement agencies enables the AMCU to gather additional case evidence, and law enforcement agencies can use the AMCU's findings described in the relevant decisions in their criminal proceedings.

18. For example:

***1.3.1. Case study 1. The bid-rigging on the market of building and repair of roads and motorways. The decision of the temporary administrative board of the AMCU dated 28.12.2017 No. 7-p/mk-mb.***

19. In the process of detecting anticompetitive concerted practices of economic entities, the AMCU took into account the analysis of mandatory tax reporting provided by the Financial Investigation Department of the State Fiscal Service's Office in Odessa Region. In particular, the analysis contained facts: on labour relations; receipt by authorized persons of certificates of the absence of tax debts; economic relationships based on tax invoices.

20. While challenging this decision to the courts, the Supreme Court of Ukraine upheld the AMCU based on the findings of the courts of previous instances. Having confirmed the information that the materials provided by the Financial Investigation Department of the State Fiscal Service's Office in Odessa Region (obtained as a result of investigative and covert investigative actions) are written evidence. The AMCU independently determines the sources, method of obtaining and amount of information that are necessary for a complete and objective clarification of the circumstances of the case.

***1.3.2. Case study 2. The bid-rigging on the market of water facilities (AMCU's Decision dated 02.11.2017 No. 612-p)***

21. In the process of detecting anticompetitive concerted practices of economic entities, the AMCU took into account the materials provided by the National Anti-Corruption Bureau of Ukraine, namely: the protocol of interrogation of the director of one of the respondent companies, concluded contracts, correspondence of interested individuals, electronic documents from the defendants in the case, tax returns, financial statements of the defendants.

22. The defendants objected to the possibility of using the materials by the AMCU and challenged the materials in court. The defendant's statement was based on a violation of the principles of legality and validity, namely the using of information, which was obtained by the National Anti-Corruption Bureau of Ukraine (further – NABU) detectives at the stage of pre-trial investigation in criminal proceedings, based on a court decision. However, the Supreme Court of Ukraine held that “the statement of the defendant can not be taken into account, because the evidence in the case can be any factual evidence that makes it possible to establish the presence or absence of a violation.”

23. As a result of cooperation between law enforcement agencies the bid rigging was proved by the AMCU, and the NABU started a criminal process against 8 individuals suspected in corruption activities related to this case.

## 1.4. International cooperation

24. The AMCU interacts with competition authorities through the exchange of information and best enforcement practices. The legal basis for such cooperation is laid down in the treaties and memoranda concluded between the AMCU and the relevant competent authorities.
25. However, unlike the competition authorities of the European Union countries, between which information is exchanged via the European Competition Network (ECN), the international cooperation is limited in certain extent by the confidentiality issues. The AMCU may provide and receive restricted information to the competent authorities of other countries, solely based on Ukraine's international treaties which are ratified by the Verkhovna Rada of Ukraine. Also, the provision of restricted information may be subject to the following cumulative conditions:
- the information will be used by a competition authority solely for the performance of the tasks assigned to it by law;
  - the appropriate competition authority may provide such a mode of access to information that would not lead to the disclosure of information for other purposes or its disclosure in any way, including through unauthorized access.

## 2. Criminalization and Leniency

### 2.1. Criminalization

26. Criminalization of violations of the legislation on protection of economic competition in Ukraine has both positive and negative consequences.
27. Positives include:
- enhancing the general and special preventive effect of liability for anticompetitive concerted practices of economic entities;
  - possibility of using the means of operational and forensic activity in the investigation of anticompetitive concerted practices of economic entities;
  - stimulation of the cooperation of employees of economic entities participating in concerted actions with governmental authorities to expose and prove the anticompetitive concerted practices of economic entities.
28. Negatives include:
- in empowering the AMCU to investigate criminal cases - the need to introduce a standard of proof for which the AMCU has to build the experience, the need to review the procedural principles of the AMCU substantially;
  - In the case of empowering law enforcement authorities to investigate criminal cases under the violations of the legislation on the protection of economic competition - there is a possibility of parallel investigation practices. Law enforcement agencies are investigating criminal cases, the Antimonopoly Committee of Ukraine - facts regarding actions that do not have signs of criminal offences, for example, vertically concerted practices of economic entities. Under certain circumstances, such cases may become conflicting.

## 2.2. Leniency

29. The procedure for exemption from liability for violation is provided in Law of Ukraine "On the Protection of Economic Competition". Still, in practice, there were only a few complaints about its application. Single complaints may be due to the lack of criminal liability for breaches of the legislation on protection of economic competition, as well as high requirements to the evidence base.
30. Now the Verkhovna Rada of Ukraine has registered several bills providing for amendments to the procedure for exemption from liability for a violation, to which the AMCU has submitted its proposals and remarks.